APPENDIX A

STATE OF MINNESOTA DISTRICT COURT
MCLEOD COUNTY
FIRST JUDICIAL DISTRICT

[Filed Jan. 27, 2003]

File No. 43-C6-00-000335

LESTER BUILDING SYSTEMS, a division of Butler Manufacturing Company, and LESTER'S OF MINNESOTA, INC.,
Plaintiffs,

vs.

LOUISIANA-PACIFIC CORPORATION,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

This matter came on for trial before a jury on September 24, 2002, and was tried through October 14, 2002. On October 15, 2002, at the conclusion of deliberations, the jury returned a Special Verdict, a copy of which is attached hereto as Exhibit A. Pursuant to Rule 125 of the General Rules of Practice for District Courts and Rule 58.02 of the Minnesota Rules of Civil Procedure, a Stay of Entry of Judgment was entered for thirty (30) days by this Court on October 24, 2002. By Order dated November 18, 2002, the Stay of Entry of Judgment was extended at defendant's request until post-trial motions were heard and determined. A hearing on post-trial motions was held on December 16, 2002. The Order on Motions deciding the parties' post-trial motions was filed on January 17, 2003, a copy of which is attached hereto as

Exhibit B. Exhibits A and B are hereby fully incorporated by reference and constitute the Findings of Fact and Conclusions of Law in this matter. Accordingly, this Court having finally determined this action,

IT IS HEREBY ORDERED THAT:

Plaintiffs are entitled to Judgment against defendant in the amount of $31,375,862.21. This amount includes the original jury verdict of $29,600,000; $1,519,811 in pre-verdict interest; $189,255 in post-verdict interest; and $66,796.21 in costs and disbursements. However, the United States District Court for the District of Oregon has issued a permanent injunction enjoining "the Minnesota state court from entering judgment" on "the sum of $11.2 million" of the jury verdict. That injunction is now on appeal. Accordingly, Judgment shall now be entered in favor of plaintiffs and against defendant in the amount of $20,074,424.21 ($31,375,862.21 minus $11,200,000 of the verdict and $101,438 of interest per the injunction), but in the event the injunction is vacated, reversed or lifted, the Judgment herein shall be deemed to be in the full amount of $31,375,862.21 *nunc pro tunc*. Post-judgment interest on the amount of the Judgment will hereafter run and be calculated at the annual percentage rate established by the State Court Administrator.

LET JUDGMENT BE ENTERED ACCORDINGLY FORTHWITH.

Dated: Jan. 27, 2003 /s/ L. W. Yost
The Honorable L. W. Yost
Judge of McLeod County
District Court

The above Findings of Fact and Conclusions of Law constitute the Judgment of the Court.

Dated: Jan. 27, 2003 /s/ Robert L. Schmidt
District Court Administrator

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF MCLEOD
FIRST JUDICIAL DISTRICT

[Filed Jan. 27, 2003]

Court File No. C6-00-335

LESTER BUILDING SYSTEMS, a division of Butler Manufacturing Company, and LESTER'S OF MINNESOTA, INC.,
Plaintiffs,

vs.

LOUISIANA-PACIFIC CORPORATION,
Defendant.

SPECIAL VERDICT FORM

We the jury in the above-captioned action, return the following answers to the questions of fact presented to us:

1. Did Lester prove its breach of express warranty claim against Louisiana-Pacific?

   Yes ☒ No ☐

2. Did Lester prove its breach of implied warranty claim against Louisiana-Pacific?

   Yes ☒ No ☐

3. Was it proved that Lester was at fault and that such fault, if any, was a direct cause of its consequential damages?

   Yes ☐ No ☒

   (If your answer to Question 3 is "no," go directly to Question 5. Do not answer Question 4.)

4. Taking all of the fault that contributed as a direct cause to Lester's consequential damages for breach of warranty to be 100%, what percentage do you attribute to:

   Louisiana-Pacific _____%

   Lester _____%

5. Did Lester prove its fraud and misrepresentation claim against Louisiana-Pacific?

Yes ☒ No ☐

6. Did Lester prove its breach of contract claim regarding the Builder's Assistance Program, also referred to as the warranty repair program, against Louisiana-Pacific?

Yes ☒ No ☐

7. Did Lester prove its promissory estoppel claim regarding the Builder's Assistance Program, also referred to as the warranty repair program, against Louisiana-Pacific?

Yes ☒ No ☐

8. What amount of money will fairly and adequately compensate Lester?

Cost of Inner-Seal:	$ 3.4 million
Cost to Repair Buildings: (those not barred by the class action)	$13.2 million
Lost Profits:	$10.2 million
Cost to Restore Goodwill:	$ 2.8 million
TOTAL:	$29.6 million

9. Without regard to the class action, what is the total amount of money that would fairly and adequately compensate Lester for the Cost to Repair Buildings (both those in and out of the class action)?

$13.2 million

(Sign and date the Special Verdict Form and inform the Court Security Officer that you have finished deliberating.)

Dated: 10/15/02 @ 3:05 P.M. /s/ [Illegible]
Foreperson

APPENDIX B

COURT OF APPEALS OF MINNESOTA

No. A03-48

LESTER BUILDING SYSTEMS, a division of Butler Manufacturing Company, *et al.*,

Respondents,

v.

LOUISIANA-PACIFIC CORPORATION,

Appellant.

Feb. 17, 2004
Review Denied April 28, 2004

UNPUBLISHED OPINION

HUDSON, *Judge*.

Appellant challenges the judgment against it as a result of its sale of an allegedly defective pre-fabricated siding material known as Inner-Seal. Appellant argues that the trial court erred by denying its JNOV and new-trial motions regarding respondent's breach-of-warranty and fraud claims; and argues the trial court also erred by denying its JNOV motion regarding the costs respondent paid for the siding. Because the fraud claim is dispositive and supports the entire award on the breach-of-warranty and fraud claims; and because there is a reasonable theory that the evidence supports the verdict that respondent is entitled to recover the costs it paid for Inner-Seal, we affirm the trial court's denial of appellant's JNOV and new-trial motions. Respondent filed a notice of review and argues that the trial court erred by denying its new-trial motion for punitive damages and pre-judgment interest on the lost-profits award. Because the trial court did not clearly

abuse its discretion by denying respondent's new-trial motion for punitive damages, and because the jury exercised its discretion to determine lost profits, we also affirm the trial court's denial of respondent's new-trial motion and its order denying pre-judgment interest.

FACTS

Appellant Louisiana-Pacific Corporation (LP) manufactures building materials and wood products for home and commercial builders. LP's principal place of business is Portland, Oregon. LP manufactured and sold Inner-Seal, which is a product used for exterior siding on homes and buildings.

Respondents Lester Building Systems, a division of Butler Manufacturing Company, and Lester's of Minnesota, Inc. (collectively Lester) operate in Lester Prairie, Minnesota, and design and sell pre-engineered wood buildings for non-residential use through a network of independent builders. Lester supplies livestock-containment buildings, particularly buildings for hogs. Prior to 1991, Lester used plywood as the exterior siding on its livestock buildings.

In 1989, LP and Canton Lumber Company (Canton), a third-party distributor, approached Lester and recommended that Lester switch from plywood to Inner-Seal. LP presented Lester with several brochures and written product descriptions that made statements about the quality of Inner-Seal. LP assured Lester that Inner-Seal was resistant to moisture, was proven to be superior to plywood, and that it came with a written 25-year limited warranty. Over the next 18 months, LP made additional sales visits to Lester, where LP continued to describe Inner-Seal as being superior to plywood. To ensure that LP understood the purpose for which Lester would use Inner-Seal, Lester showed LP its plant and the process it used to manufacture its exterior wall units and took LP to livestock buildings to see Lester's buildings in use. In addition, Lester invited LP to its annual builders/sales

meeting to describe Inner-Seal and its warranties to Lester's independent builders. At this meeting, LP discussed Inner-Seal's qualities, testing, and warranties and assured the builders that Inner-Seal came with a 25-year warranty. Lester contends that LP never mentioned any limitations on the 25-year warranty, nor did the brochures or written descriptions set forth any exclusion of remedies or warranty disclaimers.

Lester contends that it relied heavily on the representations LP made from 1989 to 1991 in deciding to purchase Inner-Seal. Lester's procurement manager asked LP about their experience with Inner-Seal in the field, and LP responded that it had experienced "no problems" with Inner-Seal and that the product was performing well. In addition, Lester sent a letter, dated February 4, 1991, asking LP to confirm that Inner-Seal was suitable for use in Lester's buildings. LP replied with a letter dated February 13, 1991, stating that Inner-Seal was fit for Lester's particular purpose and that Lester would have "no problems with this wall panel."

LP maintains that the warranty that accompanied Inner-Seal disclaimed liability for all incidental and consequential damages, and that the product brochure specifically directed Lester to contact LP for a copy of the "full warranty terms and conditions." LP also argues that Lester negotiated the contract with Canton for the purchase of Inner-Seal and that the negotiations covered price, lead-time, and warranty. As a result, LP claims, the 25-year warranty and its disclaimers "passed through" from LP to Canton to Lester and its customers. Thus, LP argues, as third-party beneficiary of the warranty, Lester is precluded from bringing its claims for consequential and incidental damages.

Lester ultimately purchased more than $3.4 million worth of Inner-Seal from 1991 through 1996 and installed it on more than 3,000 buildings it manufactured and sold (mostly hog barns) to individual builders and farmers. Lester provided its own warranty with these buildings. Lester claims it did not

receive LP's full written warranty with the disclaimers until years after the sales, and thus the exclusions were not an integral part of the transactions and therefore were void.

After Lester had been buying Inner-Seal for several years, reports appeared in publications about lawsuits against LP regarding Inner-Seal. Lester's president testified that LP's CEO assured him that the reported problems had nothing to do with the product Lester was using and Lester had nothing to worry about. Lester continued to buy Inner-Seal.

But during the time Lester was purchasing Inner-Seal, LP received many complaints about the siding's performance. LP received more than 2,500 claims from Minnesota alone. In addition, the Minnesota Attorney General was investigating LP for fraudulent trade practices because Inner-Seal failed to satisfy its product descriptions and warranties. By 1995, the complaints led to the filing of several lawsuits, including a nationwide class-action lawsuit in the United States District Court for the District of Oregon. That litigation led to a settlement between LP and a nationwide class of all persons who owned buildings on which Inner-Seal siding had been installed prior to January 1, 1996. The settlement was approved by the federal court in 1996, and it resolved the claims of all building owners throughout the country in exchange for LP's establishment of (1) an administration system to review and process claims, and (2) a settlement fund that has now paid approximately $500 million to class members in the six years since it was established. As part of the settlement, the owners of buildings with Inner-Seal siding installed before January 1, 1996, released claims against LP and against all those in the chain of distribution, including manufacturers and builders.

In late 1995 or early 1996, Lester began receiving claims from its customers that Inner-Seal was failing on their buildings. Lester notified LP, and the parties conducted joint inspections and agreed on certain repairs. LP initially ad-

dressed the claims under its written 25-year warranty and paid for the repairs on approximately 90 buildings. But LP later insisted that Lester's customers submit their claims through the class-action settlement administration. According to Lester, the settlement administration only made problems worse, because customers who sought compensation from the settlement administration found the process frustrating and the remedy insufficient. But none of Lester's customers opted out of the class settlement, and indeed a few of Lester's customers made claims through the settlement administration.

By late 1996, Lester had received so many complaints that it stopped buying Inner-Seal and switched back to plywood siding. Lester contends that it lost many regular customers and its reputation was ruined. Lester claims that sales dropped from $15 million in 1998 to $4 million in 1999, that its sales have not recovered, and that its business is at the brink of extinction. In 2000, Lester commenced this action against LP, contending that Lester had suffered loss of goodwill and profits as a result of LP's siding and its refusal to fund direct repairs of the barns Lester sold. Lester's claims included breach of contract, breach of express and implied warranties, fraud, misrepresentation, breach of the implied duty of good faith and fair dealing, tortious interference with contract, and various statutory claims. Lester later added a claim seeking punitive damages.

The trial court dismissed several of Lester's claims on LP's early motion for partial judgment on the pleadings; but it left the breach-of-warranty (express and implied) and fraud claims for trial. The case was tried to a jury, with Lester asserting the breach-of-warranty and fraud claims, seeking damages for consequential losses, the purchase price it paid for the siding, and the cost to repair and replace the siding on all of the barns it built using Inner-Seal. LP brought directed-verdict motions at the close of Lester's case and at the close of its own case. The trial court denied both motions; but it

determined that repair and replacement costs were recoverable if (1) the barns had been built after January 1, 1996, or (2) the jury found either (a) that the class-settlement fund would be insufficient to pay an owner's claim or (b) that the barns would suffer defects after January 1, 2003. Otherwise, repair and replacement costs were not recoverable. The trial court included a question on the special-verdict form asking the jury to specify the damages it was awarding for building repair costs and the amount it would have awarded but for the class action. The punitive-damages claim was not submitted to the jury.

The jury found that LP breached express and implied warranties, breached a contract to repair the buildings, and defrauded Lester. The jury returned a special verdict in favor of Lester for $29.6 million, including $13 million in lost profits and goodwill, $13.2 million in repair and replacement costs, and $3.4 million in costs Lester paid for the siding. The jury did not differentiate between the amount it was awarding and the amount covered by the class action. On October 24, 2002, the trial court filed its findings of fact, conclusions of law, and order for judgment, but stayed the entry of judgment pending post-trial motions.

Both parties brought post-trial motions, including LP's motions for judgment notwithstanding the verdict and for a new trial. Lester also moved for a new trial on the punitive-damages issue and a motion for pre-judgment interest on its past lost-profits award. LP sought an injunction from the United States District Court for the District of Oregon to enforce the class-action settlement and to enjoin the entry of judgment on the portion of the jury verdict that awarded damages to Lester for the cost to repair and replace siding. On December 13, 2002, the federal court partially granted that motion and entered an order enjoining the Minnesota trial court from entering judgment against LP for $11.2 million of the jury's $13.2 million verdict for repair and replacement

costs. Lester appealed that ruling to the Ninth Circuit Court of Appeals, and the State of Minnesota filed an amicus brief also seeking to overturn the injunction. That appeal is pending.

The Minnesota trial court issued its order on all post-trial motions, generally denying both parties' motions. On January 27, 2003, the trial court entered a revised order for judgment directing entry of judgment against LP in an amount reduced to reflect the Oregon federal court injunction. The trial court directed that in the event the federal court injunction was vacated, the judgment would be deemed nunc pro tunc in the full amount of the jury verdict with pre-verdict interest. LP filed a notice of appeal on March 6, 2003. Lester filed a notice of review on March 21, 2003. This appeal follows.

DECISION

I

LP makes several arguments in support of its position that the trial court erred in denying its JNOV and new-trial motions with respect to respondent's warranty claims. LP argues the trial court erred in ruling that the warranty exclusion of consequential damages and disclaimer of warranties did not apply to Lester. LP also argues that the trial court erred in ruling that there was a separate contract between LP and Lester and erred in permitting Lester to recover the costs it paid for Inner-Seal. Finally, LP argues that the limited warranty caps any damage award at twice Lester's cost. Lester counters that the warranty exclusion of consequential and incidental damages was not enforceable and contends that LP did not disclaim the implied warranties or limit its liability because the disclaimer of warranties and limitations were not part of the initial sales transactions. Lester also argues that the trial court correctly found that there was a contract between LP and Lester and properly let

the jury decide the terms of the warranty. Finally, Lester argues that the evidence supports awarding the costs it paid for the siding.

This court reviews de novo the denial of a motion for JNOV. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). Where the trial court has denied JNOV, this court reviews the evidence in the light most favorable to the prevailing party and the denial "must be affirmed, if, in the record, there is any competent evidence reasonably tending to sustain the verdict." *Id.* (quotation omitted). This court will not set aside the verdict "if it can be sustained on any reasonable theory of the evidence." *Id.*[1]

A.

LP argues that the warranty exclusions of consequential and incidental damages apply to Lester's tort claims. Lester counters that LP waived this issue because LP did not raise it below. Lester further argues that if the issue is not waived, the warranty exclusion of consequential damages does not apply to its fraud claim. From our review of the record, it appears that LP raised this argument in its memorandum in support of its motion for partial summary judgment, but failed to seek a jury instruction or assert the argument in its JNOV or new-trial motions. But LP was prevented from pursuing this argument at trial because the trial court ruled the exclu-

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[1] LP also raised many of its JNOV arguments in a motion for a new trial, including arguing that the trial court erred in ruling that the warranty exclusion of consequential damages and disclaimer of warranties did not apply to Lester and that the trial court erred in failing to give LP's proposed jury instruction regarding the class settlement. "On appeal from a denial of a motion for a new trial, the verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in the light most favorable to the verdict." *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn.App.1992), *review denied* (Minn. Apr. 29, 1992). Thus, under either this standard or the JNOV standard, we affirm on Lester's fraud claim.

sions were not communicated to Lester as part of the initial bargain, and therefore Lester was not precluded from recovering consequential, incidental, and breach-of-implied-warranty damages. But we need not reach Lester's breach-of-warranty claims because we hold that the trial court properly denied LP's motion for JNOV on Lester's fraud claim, which we deem dispositive.

Reviewing the denial of JNOV in the light most favorable to the verdict, there is competent evidence reasonably tending to sustain the jury's verdict on Lester's fraud claim. It is well settled that a disclaimer of warranties does not preclude an action for fraud. *See Hydra-Mac, Inc. v. Onan Corp.*, 430 N.W.2d 846, 852 (Minn.App.1988) (holding a disclaimer of warranties does not preclude an action for fraud), *aff'd in part, rev'd in part by Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913 (Minn.1990). Thus, while LP may exclude consequential damages, the exclusion is ineffective as to LP's own fraud. *Clements Auto Co. v. Serv. Bureau Corp.*, 444 F.2d 169, 188-89 (8th Cir.1971) (applying Minnesota law and finding an exclusion of consequential damages is ineffective as to a party's own fraud). Viewing the evidence in the light most favorable to Lester, we conclude the evidence supports the finding that the disclaimer of warranties and exclusion of consequential damages is ineffective as to LP's own fraud. This is true even if we were to accept LP's claim that the warranty exclusion of consequential damages and disclaimers "passed through" Canton to Lester, making it irrelevant—according to LP—that Lester did not actually see the exclusion and disclaimer language until years after the sales were completed. In sum, LP cannot contractually disclaim liability for consequential damages resulting from its fraudulent contract.

LP also argues that the economic-loss doctrine precludes Lester's recovery of damages for fraud and misrepresentation because it prevents recovery in tort when contract remedies are available. Lester counters that the economic-loss statute

exempts claims of fraud. Viewing the evidence in the light most favorable to Lester, we conclude there is competent evidence reasonably tending to sustain the verdict. The economic-loss statute precludes recovery for economic loss for certain torts, but the statute specifically states that claims based on fraud are not barred. *See* Minn.Stat. § 604.10(e) (2002) (stating the economic-loss doctrine shall "not be interpreted to bar tort causes of action based upon fraud or fraudulent or intentional misrepresentation or limit remedies for those actions"). Therefore, the economic-loss statute does not preclude Lester from recovering damages for fraud and misrepresentation.

LP contends, however, that cases applying the economic-loss doctrine have barred recovery on fraud and misrepresentation claims that are: (1) not independent of or collateral to an underlying contract for the sale of goods; and (2) relate to the character and quality of the goods. LP contends that Lester's fraud and misrepresentation claims concern the quality and character of Inner-Seal. Lester counters that the fraud and misrepresentation claims extend beyond the quality and character of Inner-Seal and that the statute does not require that actionable fraud be independent of or collateral to the contract.

LP's position is not supported by the law or the facts in this case. First, the federal cases that LP relies on did not consider the recent amendment to section 604.10, which clearly states that fraud claims are not barred. *See Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 882 (8th Cir.2000) (stating that the amendment to Minn.Stat. § 604.10(e) that states "this section shall not be interpreted to bar tort claims" does not apply to this case); *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086 n. 3 (8th Cir.1998) (finding that Minn.Stat. § 604.10 does not apply). In addition, the statute makes no distinction between fraud that is and fraud that is not independent of or collateral to the underlying sales

contract; nor does it state that misrepresentation claims relating to the character and quality of the goods are barred. *See* Minn.Stat. § 604.10. Furthermore, the evidence, viewed in the light most favorable to Lester, supports the finding that Lester's fraud and misrepresentation claims extend beyond the quality and character of Inner-Seal. LP represented that it rigorously tested Inner-Seal and it was proven to be superior to plywood; but evidence produced at trial revealed that LP had not performed any tests showing that Inner-Seal was superior to plywood. LP also represented that it had no problems with Inner-Seal in the field, but the evidence showed LP had received and settled numerous claims across the nation. In addition, the evidence showed that at the same time LP was telling Lester that it had no problems with Inner-Seal, the Minnesota Attorney General was investigating LP for deceptive marketing practices. The evidence also revealed that after Lester heard of problems with Inner-Seal, LP falsely assured Lester that the problems had nothing to do with the Inner-Seal that Lester was purchasing and that Lester had no reason to worry. Plainly, this evidence goes to the character and quality of Inner-Seal, but it also demonstrates a pattern of misrepresentation by LP in order to induce Lester to purchase Inner-Seal and to continue purchasing Inner-Seal. In the light most favorable to Lester, the evidence supports the finding that LP's representations extended beyond the quality and character of Inner-Seal. And even if it did not, the economic-loss statute does not specifically bar misrepresentation claims relating to the quality and character of product.

LP also argues that even if the economic-loss doctrine did not bar Lester's fraud and misrepresentation claims, Lester's damages for fraud are limited to its out-of-pocket losses. LP argues that damages for anticipated lost profits are not available in Minnesota on a fraud claim. Lester counters that LP never raised the "out-of-pocket" argument below and this court should not consider it. Lester contends that if this court considers the out-of-pocket loss issue, Lester is entitled to the

full jury award on its fraud claim because the jury did not award Lester future lost profits. A review of the record reveals that LP did not raise the out-of-pocket loss issue below, and this court will not consider arguments not raised in the court below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988). Even if LP had raised the out-of-pocket issue below, the jury only awarded Lester its actual lost profits and did not award anticipated lost profits. The testimony presented by Lester's damages expert was that Lester suffered $10.2 million in past lost profits, and Lester anticipated losing an additional $2.7 million of profits during 2003. The jury entered $10.2 million on the special-verdict form next to the category entitled "Lost Profits." Viewing the evidence in the light most favorable to the verdict, the jury awarded Lester its actual lost profits and did not award anticipated lost profits.

B.

LP argues that the trial court erred by permitting Lester to recover the cost it paid for the siding because the evidence shows that Lester resold the siding it purchased from LP at a profit, and Lester therefore has no damages. Lester argues that the difference between the actual value of the siding and its value had it been as warranted was $3.4 million, and under Minnesota law, it is entitled to recover the difference between the value of the product as warranted and the value as accepted, regardless of whether the purchaser resells it for an equal or greater price.

It is well settled that a buyer is entitled to recover the difference between the value of the product as warranted and the value of the product as accepted, regardless of whether the buyer resells the product for an equal or greater price. *Miamisburg Twine & Cordage Co. v. Wohlhunter*, 71 Minn. 484, 486, 74 N.W. 175 (1898); *see also DeGidio Oil & Gas Burner Sales & Serv., Inc. v. Ace Eng'g Co.*, 302 Minn. 19, 27-28, 25 N.W.2d 217, 223 (1974) (finding a buyer of a defective product can recover the full price paid for the

product regardless of the profit it realized on resale). Viewing the record in the light most favorable to Lester, there is competent evidence reasonably tending to sustain the verdict. The evidence shows that LP warranted the value of Inner-Seal to be $3.4 million, based on the price Lester paid for Inner-Seal. The evidence also shows that because Inner-Seal could not be used for Lester's intended purposes, it had no value to Lester when Lester purchased it. Because there is a reasonable theory supporting the verdict that Lester is entitled to recover the costs it paid for Inner-Seal, we affirm.

C.

LP argues that the trial court erred in allowing the jury to consider Lester's claim for repair and replacement costs on buildings constructed before January 1, 1996, but contends that the error has been rectified by the injunction issued by the federal district court in Oregon. Therefore, LP contends, this court need not address the issue unless and until the Ninth Circuit reverses that injunction. Lester counters that the jury properly awarded damages for the cost to repair. Lester contends that the issue is ripe for review now and argues that LP has waived the issue since it asked this court not to review the issue.

The judgment that the Minnesota trial court entered does not include the $11.2 million portion for repair costs, because the Minnesota trial court complied with the federal injunction. The Minnesota trial court stated that if the injunction is vacated, the award will be in the full amount (which includes the $11.2 million) nunc pro tunc. Because the $11.2 million for repair costs is not currently part of the judgment, LP is currently not aggrieved by the judgment and cannot appeal it. Therefore, this court need not address the issue. *Twin Cities Metro. Pub. Transit Area v. Holter*, 311 Minn. 423, 425, 249 N.W.2d 458, 460 (1977) (holding a party not aggrieved by a judgment cannot appeal it); *see also Schaust v. Town Bd. of Hollywood Township*, 295 Minn. 571, 572, 204 N.W.2d 646,

648 (1973) (appeal from judgment prior to entry is premature and must be dismissed). It is possible the federal injunction will never be reversed, and therefore LP may never be aggrieved. If the injunction is reversed, the trial court would amend the current judgment to enter the $11.2 million portion for repair costs, and LP may appeal from the amended judgment at that point. *See Duluth Ready-Mix Concrete, Inc. v. City of Duluth*, 520 N.W.2d 775, 777 (Minn.App.1994) (stating that entry of judgment nunc pro tunc cannot operate to cut off a party's appeal rights). LP will, however, be limited to appealing only the issues in the amended judgment. *See Burwell v. Burwell*, 433 N.W.2d 155, 156 (Minn. App.1988) (stating that on appeal from an amended judgment, this court may not review issues decided in the original judgment). The fact that LP will be limited to appealing the issues in the amended judgment will not affect LP's rights, as LP has raised its other issues stemming from the original judgment in this appeal.

II

Lester argues that the trial court abused its discretion in denying Lester's motion for a new trial on the punitive-damages issue.

The trial court has the discretion to grant a new trial and this court will not disturb the decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn.1990). The verdict must stand unless it is "manifestly and palpably contrary to the evidence, viewed in the light most favorable to the verdict." *ZumBerge*, 481 N.W.2d at 110.

In Minnesota, a party is entitled to a new trial on the issue of punitive damages if it presented clear and convincing evidence that the defendants acted with "deliberate disregard for the rights or safety of others." Minn.Stat. § 549.20, subd. 1(a) (2002); *Hawkinson v. Geyer*, 352 N.W.2d 784,

788-89 (Minn.App.1984). A defendant acts with deliberate disregard if

> the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and: (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn.Stat. § 549.20, subd. 1(b). A defendant is willfully indifferent to the rights of others if the defendant allows a business to "slowly and painfully die" because of an intentional fraud that is concealed. *Hydra-Mac*, 430 N.W.2d at 856.

The evidence here does not rise to the high clear-and-convincing standard to show that LP deliberately disregarded Lester's rights. We acknowledge that there is some evidence to support Lester's argument, including: LP's representation to Lester that LP had no problems with Inner-Seal in the field, when in fact LP had received, and settled, numerous claims; and LP's assurance that Lester had no reason to worry, because the problems Lester inquired about had nothing to do with the Inner-Seal Lester was purchasing. The evidence also suggests, however, that LP was engaged in efforts to ensure Inner-Seal would be well suited to Lester's application and even declined to sell the product for interior applications that LP thought would be inappropriate. The evidence also shows that when Inner-Seal began to fail, LP initially worked with Lester to reimburse Lester for the cost of repairs. The trial court was correct when it stated, "The evidence presented by [Lester] about what took place during the time period that they purchased Inner-Seal in, although reprehensible, did not rise to the level of clear and convincing evidence that there was deliberate disregard on the part of [LP] in its dealings with Lester." Because the trial court did not clearly abuse its

discretion in denying Lester's motion for a new trial on the punitive-damages issue, we affirm.

III

Lester argues it is entitled to pre-judgment interest on the lost-profits award, because the lost profits were readily ascertainable at the time the losses were incurred.

Both statute and common law govern the award of pre-judgment interest. Minn.Stat. § 549.09 (2002); *Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn.App.1998). The construction of a statute is a question of law that is reviewed de novo. *Trapp*, 587 N.W.2d at 63. Issues underlying the application of the statute, such as whether a claim is readily ascertainable, are questions of fact that will not be reversed unless clearly erroneous. *Id.*

Minn.Stat. § 549.09 permits the recovery of pre-judgment interest on damages, with various exceptions including future damages, irrespective of whether the damages were ascertainable prior to trial. Minn.Stat. § 549.09, subd. 1(b) (2002); *see Leinhard v. State*, 431 N.W.2d 861, 865 (Minn.1988) (stating that section 549.09 was amended to allow pre-verdict interest irrespective of a defendant's ability to ascertain the amount of damages for which he might be held liable). Pre-judgment interest is not appropriate when calculation of damages rests in whole or in part on the jury's discretion. *Noble v. C.E.D.O., Inc.*, 374 N.W.2d 734, 743 (Minn. App.1985), *review denied* (Minn. Nov. 18, 1985); *Spinett, Inc. v. Peoples Natural Gas Co.*, 385 N.W.2d 834, 841 (Minn.App.1986).

The trial court noted that the jury, in exercising its discretion, determined that lost profits had been proven. The parties' experts presented conflicting testimony on Lester's lost profits. LP's expert testified that the hog market was very soft and attributed that to Lester's drop in profits. Lester's own witnesses, including its former president, published

articles about the collapse of the hog industry. The jury could have found that the state of the hog market contributed to Lester's drop in profits. Because we conclude that the jury exercised its discretion to determine the proper calculation of Lester's lost profits, pre-judgment interest is not appropriate, and we affirm.

Affirmed.

APPENDIX C

IN SUPREME COURT
STATE OF MINNESOTA

[Filed Apr. 28, 2004]

A03-48

LESTER BUILDING SYSTEMS, a division of Butler Manufacturing Company, *et al.*,

Respondents,

vs.

LOUISIANA-PACIFIC CORPORATION,

Petitioner.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Louisiana-Pacific Corporation for further review be, and the same is, denied.

Dated: April 28, 2004

BY THE COURT:

/s/ Kathleen A. Blatz
KATHLEEN A. BLATZ
Chief Justice

Supreme Court, U.S.
FILED
JUN 6 - 2006
OFFICE OF THE CLERK

No. 05-1346

In the

Supreme Court of the United States

October Term, 2005

LOUISIANA-PACIFIC CORPORATION,

Petitioner,

v.

LESTER BUILDING SYSTEMS, A DIVISION OF BUTLER MANUFACTURING COMPANY, and LESTER'S OF MINNESOTA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Louisiana-Pacific Corporation ("LP") respectfully submits this reply in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in favor of Lester Building Systems and Lester's of Minnesota, Inc. (collectively, "Lester").

A. Contrary to Respondent's Overly Narrow Reading of the Case Law, the Court of Appeals' Decision Creates a Conflict Among the Circuits

At issue here is whether a district court may enjoin a portion of a state court proceeding that will "directly interfere with and seriously impair" the district court's continuing jurisdiction over the implementation and enforcement of a complex class action settlement,[1] where the enjoined portion of the state proceeding awards damages for the very same injuries that were previously addressed in the class settlement, thereby creating a special benefit and double recovery for a sub-group of the class members. Under existing precedent from the Second, Third, and Eleventh Circuits, the answer to that question should be in the affirmative.

In the decision below, however, the Ninth Circuit answers that question in the negative. In its interpretation of the Anti-Injunction Act, 28 U.S.C. § 2283, and identical relevant language in the All Writs Act, 28 U.S.C. § 1651(a), the decision below conflicts with the decisions of other circuit courts, including *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985); *Battle v. Liberty National Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989); *United States v. International Brotherhood of Teamsters*, 907 F.2d 277 (2d Cir. 1990) ("*IBT*"); and *In re Diet Drugs*, 282 F.3d 220 (3rd Cir. 2002). Further review therefore is warranted to resolve this conflict and to maintain the ability of federal courts efficiently and consistently to approve, monitor, and enforce complex settlement agreements in class action lawsuits.

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[1] Perhaps evidencing the complexity of the underlying products liability class settlement, Respondent misstates its terms. Respondent asserts that the settlement "does not apply to or bar . . . claims of nonperformance that occur after January 1, 2003. Br. in Opp. 8 n. 2. The state trial court in Minnesota made the same error. See Pet. App. 11a. The actual class settlement contains no such exception. See Pet. App. 5a n. 2. and Pet. App. 72a-73a.

1. Respondent argues that the Court of Appeals' decision does not conflict with the Second Circuit's decision in *Baldwin-United* because the Anti-Injunction Act did not apply in that case and because "unlike the state attorneys general enjoined in *Baldwin-United,* Lester asserted its own claim for damages under Minnesota law, not a claim belonging to others." See Br. in Opp. 17-18.

In *Baldwin-United,* however, the Second Circuit explicitly relies on Anti-Injunction Act cases in analyzing identical language in the All Writs Act, and it recognizes, as have other courts, that these statutes need to be interpreted consistently. 770 F.2d at 335-36; see also *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 197 (3rd Cir. 1993) (holding that the provisions of the two acts are applied similarly).

Further, in *Baldwin-United* the Second Circuit also recognized that while the class members themselves did not threaten to bring additional suits, if parties "could derivatively assert the same claims on behalf of [class members] there could be no certaint[y] about the finality of any federal settlement." 770 F.2d at 337.

The derivative claims that the Second Circuit saw as threatening the district court's jurisdiction are the same kind of claims that the district court enjoined in this case. As the dissent below correctly observed:

> Lester clearly sought a double recovery for its customers. . . . At trial in the Minnesota state court, Lester's president testified. He told the jury that the company sought damages to "fix these buildings" and to get each customer "what he's entitled to." . . . There can be no dispute that the $11.2 million enjoined by the district court is an award *for the benefit* of the class member-customers, and not for the benefit of Lester.

Pet. App. 55a-56a (emphasis in original).

The claims enjoined in *Baldwin-United* were not direct claims of the class members; the injunction in that case

extended to claims seeking money damages of any kind as long as they were "arising out of" the facts presented in the district court litigation. See 770 F.2d at 334. That is the same situation here; Lester seeks money damages "arising out of" the same facts presented in the district court litigation, namely property damage on structures owned by Lester's customers. As the dissent below noted,

> whether or not Lester had a "cognizable state law claim" is inconsequential to the question we must decide – whether the jury's award is inconsistent with the settlement agreement. There can be no doubt that it is. They jury awarded damages for the very same repair costs previously provided for in the settlement agreement and district court order.

Pet. App. 52a.[2]

The dissent in this case explicitly notes that the panel decision "create[s] a direct conflict with" *Baldwin-United*. Pet.

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[2] Lester also argues that under Minnesota law it is entitled to recover the cost to repair defective product and cites in support *DeGidio v. Ace Engineering Co.*, 225 N.W.2d 217, 233 (Minn. 1974), and *Ag-Chem Equip. v. Ceram-Traz Corp.*, C9-95-2074, 1996 WL 229263, at *2-3 (Minn. Ct. App. May 7, 1996). Br. in Opp. 24. Neither case, however, supports Lester's proposition here because both cases *explicitly* assume as part of their analysis that the end user of the products at issue would be able to sue the plaintiffs in those cases for recovery of the costs of product repair or replacement. In *DiGidio*, the court concluded that plaintiff DeGidio "had a liability to his vendees to make them whole." 225 N.W. 2d at 222. Similarly, in *Ag-Chem*, the costs of repairing machines already sold to customers was "solely Ag-Chem's liability," and the repair costs awarded to Ag-Chem "accurately reflect[ed the] risk" associated with potential future lawsuits by its customers against Ag-Chem. 1996 WL 229263, at *3. Under the class settlement at issue here, however, all class members fully released all claims against all persons and entities in the chain of distribution, including Lester. Pet. App. 6a. Because Lester faced no risk of legal liability to its customers (unlike *DiGidio* and *Ag-Chem*), there can be no real dispute that the enjoined portion of Lester's verdict was for the benefit of the class members, not to compensate Lester for any risk of potential liability.

App. 58a. This Court should resolve that conflict. As the dissent commented:

> The jury's verdict can be enjoined simply because it awards additional damages to be used for the benefit of class members in satisfaction of claims for which they have already been compensated under the settlement agreement. The fact that a third party brings the action in its own name is without consequence.

Pet. App. 58a.

2. Respondent next argues that the Court of Appeals' decision does not conflict with the Eleventh Circuit's decision in *Battle* because the court of appeals here did not hold that the entry of a final judgment in the class action, alone, precluded application of the "necessary in aid of jurisdiction" exception of the Anti-Injunction Act and, unlike here, the state court plaintiffs enjoined in *Battle* were members of the class. See Br. in Opp. 18-19.

In *Battle*, however, the Eleventh Circuit explicitly held that the entry of a final judgment by a district court *does not* bar that court from enjoining state court action under the "in aid of jurisdiction" exception in the Anti-Injunction Act. *Battle*, 877 F.2d at 881 (citing in support cases from the Second and District of Columbia Circuits). The decision below reaches a contrary conclusion when it states: "Because the litigation was over, the state court action could not have interfered with the district court's consideration or disposition of the class claims." Pet. App. 22a.[3]

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[3] In addition, the implementation of the class settlement over which the district court retained jurisdiction had not yet been concluded when Lester obtained its verdict in Minnesota state court. Lester's trial court verdict was rendered in October 2002. Pet. App. 8a. In the class settlement, however, LP retained the right to make certain decisions into 2003 regarding whether to provide additional funding to pay pending claims. Pet. App. 4a n. 1. The district court entered its permanent

Moreover, although Lester was not itself a member of the underlying class, as the dissent explained, allowing Lester to recover these repair costs for the benefit of the class members would "condone[] a double-recovery by a sub-group of class members in direct contravention of the settlement agreement and encourage[] the proliferation of similar sub-groups and similar lawsuits in other states." Pet. App. 44a.

3. Respondent next argues that the Court of Appeals' decision does not conflict with the Second Circuit's decision in *IBT* because that case did not involve the Anti-Injunction Act and because Lester was not a member of the underlying class. See Br. in Opp. 19-20.

The decision below refused to apply the "protect or effectuate" exception of the Anti-Injunction Act to anything other than cases in which a "rigorous application of *res judicata* principles" would lead to a conclusion that the state suit was barred. Pet. App. 28a. The court held that because Lester was not a party to the settlement, it could not be bound by it, and thus the damages at issue could not be enjoined.

In the Second Circuit's decision in *IBT*, however, the court held under the All Writs Act that injunctions may issue against non-parties in order to prevent those non-parties from interfering with a district court's ability to implement a consent decree. 907 F.2d at 280. That authority, *IBT* concluded, was necessary if the district court was to "protect" and to "effectuate" its judgment. *Id.* at 280, 281. The Second Circuit therefore found authority to issue injunctions under the All Writs Act, and it did so using the precise language of the third exception to the Anti-Injunction Act. *IBT* explicitly holds that the binding effect of a prior judgment is *irrelevant* to a district court's authority to "protect"

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injunction against Lester on December 13, 2002. Pet. App. 70a. LP made its final decision to fund all outstanding claims in the class settlement in September 2003. Pet App. 6a. Thus, in this very practical sense, the district court litigation was not "over" when the district court entered its order against Lester.

and "effectuate" its judgment as long as a subsequent action threatens the implementation of that judgment. *Id.* at 280, 281. There is no reason for that to be any less true under the Anti-Injunction Act than under the All Writs Act.

4. Respondent next argues that the court of appeals' decision does not conflict with the Third Circuit's decision in *Diet Drugs* because, among other reasons, no settlement had been entered at the time that the district court in that case issued its injunction, and the settlement discussions there were in "sensitive final stages." See Br. in Opp. 20-22. Respondent's argument misses the point of *Diet Drugs*.[4]

As the dissent below noted, Pet. App. 66a-68a, *Diet Drugs* held that in complex class litigation, a settlement and the benefits thereof become much like a *res* over which the district court may exercise continuing control under this exception to the Act. See 282 F.3d at 235-36 and n. 12. Moreover, as this Court has long recognized, federal courts may protect their jurisdiction over a *res* under the Anti-Injunction Act. See *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 135-36 (1941); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).

The idea of a complex settlement as a *res* within the Court's jurisdiction – and therefore protectible even after the entry of a "final" settlement – is one that the Ninth Circuit brushed aside in the decision below, Pet. App. 22a n. 20, but one on which at least the Second, Third, and Eleventh Circuits have relied in affirming the issuance of injunctions in order to protect complex class settlements.[5] It is a sufficient alternative basis for the district court's authority here.

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[4] In addition, the final implementation of the federal class settlement here was similarly in its "sensitive final stages" at the time of the Minnesota state trial verdict in favor of Lester. See 5 n. 3, *supra*.

[5] In *Diet Drugs*, the Third Circuit notes that "several . . . courts have analogized complex litigation cases to actions *in rem*," 282 F.3d at 235-36 and 235 n.12 (citing cases). In *Battle*, the Eleventh Circuit observes that "it makes sense to consider this case, involving years of litigation

B. Respondent's Other Arguments in Opposition to the Petition Are Also Without Merit

Respondent also argues that this case turns on an issue of Minnesota law, that the Class Action Fairness Act has no bearing on this case, and that the petition should be denied because the injunction was improper for additional reasons not reached by the court of appeals. See Br. in Opp. 23-28. Respondent overstates its case, ignores circuit conflicts, and fails to recognize the national importance of the issue here.

1. In the Minnesota lawsuit, Lester was awarded a total verdict of $29.6 million. Pet. App. 11a n. 8. That amount consists of $10.2 million in lost profits, $2.8 million in cost to restore goodwill, $3.4 million in cost of product purchased, and $13.2 million in cost to repair buildings. *Id.* The $13.2 million figure consists of $2 million to repair buildings constructed after the closing for class membership under the class definition, plus $11.2 million to repair buildings covered under the settlement. Pet. App. 13a n. 9.

It is only this last $11.2 million that was enjoined by the district court below. Pet. App 12a-13a. Thus, $18.4 million of Lester's Minnesota verdict is unaffected by the district court's injunction and is not at issue in this petition. All that is at issue here is that limited portion of the state court judgment ($11.2 million) that is "for the very same repair costs previously provided for in the settlement agreement and district court order," that is "for the benefit of the class member-customers" (as confirmed by the trial testimony of Lester's own president), and that constitutes a "double-recovery by a sub-group of class members." Pet. App. 52a, 55a-56a, and 44a (Reinhardt, J., dissenting).

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and mountains of paperwork, as similar to a *res* to be administered . . . This lengthy, complicated litigation is the 'virtual equivalent of a *res*.'" 877 F.2d at 882 (citations omitted). The Second Circuit reaches the same conclusion in *Baldwin-United*, 770 F.2d at 337 (same).

The issue in this case is not whether Minnesota state law would permit this verdict; the issue is whether, under federal law, a district court may enter an injunction against a portion of a state court verdict that the district court has found will "directly interfere with and seriously impair" its continuing jurisdiction over the implementation of a class settlement by awarding to a third party damages for the very injuries that were addressed in the settlement. This question involves the interpretation of the Anti-Injunction Act and the All Writs Act, which contains relevant identical language that must be construed consistently with the first statute.

2. As discussed in the petition, the recently-enacted Class Action Fairness Act, Pub. L. No. 109-2, 118 Stat. 4 (Feb. 18, 2005) (amending 28 U.S.C. § 1332(d) to extend federal jurisdiction to certain class actions alleging more than $5 million in damages), will likely result in federal courts seeing even more filings of complex class action lawsuits, which previously would have been filed in state court. The uncertainty and harm created by the decision below will only be magnified by this development. In combination with the conflict with other circuits generated by the decision below, the importance of this issue merits this Court's attention.

3. Before the court of appeals, Lester presented several alternative arguments in support of its position that the district court erred. The court of appeals rejected Lester's subject matter jurisdiction, personal jurisdiction, and improper service argument, Pet. App. 15a-17a, and Lester has not cross-petitioned. With regard to Lester's other arguments below, the court of appeals did not address them because it held that the district court's injunction cannot be sustained under the Anti-Injunction Act. Pet. App. 18a n. 15. Lester's arguments that were not addressed by the court of appeals have no merit and should not be considered.